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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. TEDDY SEUNG BAEK, Defendant and Appellant.	D053402 (Super. Ct. No. SCD203314)

APPEAL from a judgment of the Superior Court of San Diego County, Charles G. Rogers, Judge. Affirmed.

I.

INTRODUCTION

A jury found Teddy Seung Baek guilty of sexually assaulting two women, Stephanie M. (counts 1-6) and Jackie P. (count 7). As to Stephanie M., the jury found Baek guilty of two counts of sexual penetration by a foreign object (Pen. Code,[1] § 289,

1 Unless otherwise specified, all subsequent statutory references are to the Penal Code.

subd. (a)) (counts 1, 4), two counts of forcible oral copulation (§ 288a, subd. (c)(2)) (counts 2, 3) and two counts of forcible rape (§ 261, subd. (a)(2)) (counts 5, 6). As to each of these counts, the jury also found true the following One Strike law (§ 667.61) special circumstances allegations: committing the offense during a burglary with the intent to commit a forcible sex crime (§ 667.61, subd. (d)), committing an offense against multiple victims (§ 667.61, subd. (e)), and tying or binding the victim during the commission of the offense (§ 667.61, subd. (e)).

As to Jackie P., the jury found Baek guilty of sexual penetration by a foreign object (§ 289, subd. (a)) (count 7). With respect to count 7, the jury also found true the following One Strike law (§ 667.61) special circumstances allegations: committing the offense during a burglary with the intent to commit a forcible sex crime (§ 667.61, subd. (d)), committing an offense against multiple victims (§ 667.61, subd. (e)), tying or binding the victim during the commission of the offense (§ 667.61, subd. (e)), and personally using a dangerous or deadly weapon during the commission of the offense (§ 667.61, subd. (e)).[2]

At the sentencing hearing, the trial court sentenced Baek on counts 1 and 7 to two consecutive sentences of 25 years to life, and to full-strength consecutive upper term sentences of eight years each on counts 2 though 6. The court sentenced Baek to a total aggregate term of 90 years to life in prison.

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[2] The trial court declared the jury hopelessly deadlocked on a charge of attempted residential burglary (§§ 459, 460, 664) as to victim Christine N. (count 8). The court subsequently dismissed count 8, pursuant to section 1385.

On appeal, Baek claims that the trial court erred in overruling defense counsel's hearsay objections to portions of two witnesses' testimony, precluding defense counsel from offering evidence pertaining to uncharged peeping and prowling offenses, excluding third party culpability evidence, and failing to grant Baek's motion to sever trial of count 8 from the remainder of the charges. In addition, as to victim Stephanie M., Baek claims that there is insufficient evidence to support the jury's findings of guilt on more than one count of sexual penetration by a foreign object or more than one count of forcible oral copulation. Baek also claims that there is insufficient evidence to support the jury's true finding on the dangerous or deadly weapon special circumstance allegation as to count 7. Finally, Baek claims that the trial court erred in imposing consecutive sentences on counts 1 through 6. We affirm the judgment.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The prosecution's evidence*

1. *The sexual assaults of Stephanie M.*

In the early morning hours of June 13, 2005, Stephanie M. was awakened by the rattling of blinds on her bedroom window. She opened her eyes and saw a man standing on her window sill. Stephanie M. stood up, and the man jumped down from the window sill, pushed her down, covered her mouth, and put a cloth over her nose. The man tied a rag around Stephanie M.'s head to blindfold her and laid her down on her bed. When Stephanie M. asked the man what he wanted, he replied, "Shut up or I will hurt you . . . I only want your body." The man spoke with an Asian accent and smelled like cigarettes.

The man ordered Stephanie M. to touch her genitals. Stephanie M. complied. The man then kissed Stephanie M. on various parts of her body and placed his fingers in her vagina. Stephanie M. believed that the man might have been wearing latex gloves. The man told Stephanie M. that he had "heard her," and that he "had to come back." Stephanie M. interpreted these comments to mean that the man had heard her having sexual intercourse with her boyfriend in her apartment earlier in the evening.

The man licked Stephanie M.'s vaginal area and got on top of her while she was on her bed. After Stephanie M. asked the man if he would use a condom, the man asked her whether she had any. Stephanie M. directed the man to her closet, where she kept condoms. The man got off of Stephanie M. and left the bed to retrieve a condom. When he returned, he placed his penis inside of Stephanie M.'s vagina. However, he was unable to achieve an erection and, after a few minutes of attempting to have sexual intercourse, ordered Stephanie M. to touch her genitals again. The man then made a second attempt at intercourse by placing his penis in Stephanie M.'s vagina. However, he was still unable to penetrate her vagina very deeply.

After the second attempt at penetration, the man lay down next to Stephanie M. and spoke with her, asking her questions such as her name, her occupation, and whether she was Thai. The man also asked whether it was her boyfriend who had left the apartment earlier. The man told Stephanie M. that he was sorry, and instructed her to get on all fours. Stephanie M. complied. At some point, the man asked Stephanie M. if she had any lubrication. After Stephanie M. stated that she did not, the man obtained some of Stephanie M.'s hair gel from her desk. While Stephanie M. was on her hands and knees,

the man squeezed the gel into her vagina. He then told Stephanie M. to get on her back, and after she did so, made a third attempt at sexual intercourse, again penetrating Stephanie M.'s vagina only slightly. During this attempt, the man said that he did not know "why it wasn't working." Stephanie M. attempted to calm the man down by telling him that he was a "good person." He replied that he would not be there if he was a good person.

The man pled with Stephanie M. not to call the police before making yet another attempt at sexual intercourse. The man placed his penis in Stephanie M.'s vagina for approximately 10 to 15 minutes. However, he was still unable to achieve an erection. At some point during the series of sexual assaults, the man placed his mouth on Stephanie M.'s vaginal area for a second time and placed his fingers in her vagina a second time.

After the man left Stephanie M.'s apartment, she called her boyfriend, who telephoned the police. The police took Stephanie M. to a clinic where a nurse performed a sexual assault examination on her.

2. *The sexual assault of Jackie P.*

In the early morning hours of March 6, 2006, Jackie P. was sleeping in her bed. She was awakened when she felt a person on top of her. When she opened her eyes, she saw an Asian man. The man smelled like cigarettes. The man held his hands over Jackie P.'s mouth, pressed a cold and metallic object against her face, and told her to be quiet. The man pulled some covers off of Jackie P. and started to kiss her mouth and breasts. Jackie P. began to struggle, but stopped when the man held his hand over her mouth, slapped her, and reached for an object, which Jackie P. feared was a knife. After

Jackie P. stopped struggling, the man left the room, closed a window, and returned with some pajama bottoms that had previously been on the floor. The man blindfolded Jackie P. with the pajama bottoms. The man then took a scarf from Jackie P.'s bedroom and tied her hands together.

After blindfolding her and tying her hands, the man pried open Jackie P.'s legs and stuck his fingers inside her vagina. According to Jackie P., it felt as though the man was wearing latex gloves. The man stuck his fingers in Jackie P.'s vagina for approximately five minutes. He then lay down next to Jackie P., telling her that he felt bad about what he was doing. The man asked Jackie P. her name and her ethnicity, and also asked her whether she would promise not to call the police if he left. Jackie P. responded that she would not call the police. Jackie P. heard the man leaving through the front door.

Within minutes of the man leaving, Jackie P. called the police. The police took Jackie P. to have a sexual assault examination performed.

3. *The incident involving Christine N.*

At approximately 2:00 a.m. on December 4, 2006, Christine N. was working on her computer in her bedroom when she heard a noise outside her bedroom window. Christine N. opened the blinds that were covering the window, and saw a figure standing inches from the window. Christine N. closed the blinds and called the police. San Diego Police Officer Kian Sly and his partner responded to the call. Officer Sly saw a man running from Christine N.'s apartment complex toward another group of apartments. Officer Sly's partner was able to apprehend and arrest the man, who was later identified

as Baek. Police took a swab from Baek's mouth, from which DNA analyses were performed.

4. *DNA evidence*

Baek's DNA matched DNA that was obtained from both Stephanie M. and Jackie P. during the examinations that were performed on the two women shortly after the sexual assaults.

B. *The defense*

Baek testified that the reason he was at Christine N.'s apartment complex on the night of his arrest was that he had been driving to his office, and needed to urinate. Baek pulled over and urinated behind a wall near some trash cans outside of Christine N.'s apartment. While he was there, the police arrested him. Baek denied that he was attempting to break into Christine N.'s apartment. Baek denied knowing Jackie P. or Stephanie M., and denied having sexually assaulted either of them.

III.

DISCUSSION

A. *The trial court did not commit reversible error in overruling defense counsel's hearsay objections to Officer Sly's and Christine N.'s testimony*

Baek claims that the trial court erred in overruling defense counsel's hearsay objections to Officer Sly's testimony regarding the investigatory significance of the combination of Baek appearing outside Christine N.'s window and police officers finding cigarettes in Baek's car during a post-arrest inventory search of his car. Baek also claims that the trial court erred in overruling defense counsel's hearsay objection to

Christine N.'s testimony regarding why she had a heightened sense of alertness when she saw Baek outside her window. We apply the abuse of discretion standard of review to these claims. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113, disapproved on another ground by *People v. Rundle* (2008) 43 Cal.4th, 76, 151.)

1. *Factual and procedural background*

a. *Officer Sly's testimony and the trial court's limiting instructions*

Officer Sly testified regarding Baek's arrest on the night of the incident involving Christine N. During Officer's Sly's testimony, the following colloquy occurred:

> "[Prosecutor]: The combination of Mr. Baek being outside of the window and cigarettes being in his car, did that concern you at all or ring any bells?
>
> "[Officer Sly]: Yes, it did.
>
> "[Defense counsel]: Objection, if he's basing that on hearsay.
>
> "The Court: Overruled.
>
> "[Officer Sly]: Do you want me to ─ basically, we had a series, a peeper series, months prior where it indicated an Asian male and they recovered cigarette butts or things of that nature. The person was a smoker, you know, in these different cases like that. So that's what stood out in my mind.
>
> "[Prosecutor]: Were you also concerned or did you also ─ were you also aware of an Asian male smoker rapist that was also in the area?
>
> "[Officer Sly]: Yes.
>
> "[Prosecutor]: Had you been briefed about that by detectives in the Northern Division?
>
> "[Officer Sly]: Yes.

"[Defense counsel]: Same objection. Hearsay. He's indicating that he was briefed or told about this.

"The Court: Overruled."

The following day, outside the presence of the jury, defense counsel asserted that Officer Sly and San Diego Police Detective Christopher Holt had testified regarding the "peeper/prowler series,"[3] and argued, "I think that leads the jury to think that maybe Mr. Baek was involved in [the] peeper/prowler series." Defense counsel requested that she be allowed to present evidence that demonstrated that Baek had been "cleared" of the peeper/prowler offenses.

The prosecutor objected to the introduction of any additional evidence regarding the peeper/prowler series, noting that Detective Holt had not testified regarding the peeper/prowler offenses, and that Officer Sly had mentioned the series only briefly during his testimony.[4] The prosecutor argued that there had been numerous peeping incidents, and that that she had "carefully kept all of that, or to the best or most I can control, out of this case." The prosecutor suggested that to present evidence regarding the approximately 20 to 30 different peeper/prowler incidents would be time consuming, and argued that evidence concerning these incidents should be excluded under Evidence Code section 352.

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3 Detective Holt testified that he investigated the sexual assault of Jackie P.

4 The prosecutor was correct that Detective Holt did not refer to the peeper/prowler series during his testimony.

Defense counsel responded that she was seeking to ask only two or three questions of Detective Holt, namely, "There [were] peeper/prowlers; you went and investigated those; you collected DNA out of cigarette butts; those did not match Mr. Baek's, period."

The trial court asked defense counsel whether her concern was that "because there's this other series that was alluded to that the jury is going to be thinking that he is somehow connected with that and might use that as evidence against him in this case." Defense counsel responded in the affirmative.

The trial court proposed that it address defense counsel's concern by giving the following limiting instruction:

> "You have heard testimony about a series of offenses involving peeping or prowling in this area, in addition to the alleged crimes that are before you. This evidence ─ this reference was admissible only because it may tend to show or explain why the officers took the investigative steps that they took."

Defense counsel responded to the proposed instruction by saying, "It's just that he was considered a suspect but he was, I think, cleared of those others through DNA." The prosecutor responded, "To say he was exonerated or cleared of anything is a stretch." The prosecutor agreed with the trial court that it would be more accurate to say that Baek had not been arrested or charged for the peeper/prowler offenses.

The trial court denied defense counsel's request to ask the proposed questions, and stated that the court would provide its proposed limiting instruction. The court reasoned that it could take a week to hear evidence regarding all of the uncharged peeper/prowler offenses, which "clearly [raised] an Evidence Code section 352 issue." However, the trial court stated that it shared defense counsel's concern, and that it "would like to make

sure that the jury is instructed that they can't conclude that he is more likely to be guilty of any of the charges before them here simply because of reference to that series . . . ."

At the end of that day's trial testimony, the trial court gave the jury the following limiting instruction:

> "You heard some testimony from one or possibly two of the police witnesses about a series of other offenses that involved peeping and prowling that existed in addition to the sexual assault incidents that we're considering in this case. Mr. Baek is not charged with any of those other alleged offenses, those peeping and prowling offenses, nor was he ever arrested for them. This reference to those other peeping and prowling offenses, or that series, was put before you because that evidence may tend to show or explain why police officers took certain investigative steps. However, the reference to those other peeping and prowling offenses or series is not evidence of Mr. Baek's guilt of any of the charges in this case. You are not to conclude that he is more likely to be guilty of any of the charges before you simply because you have heard of those other peeping and prowling series."

In addition, during its final instructions to the jury, the trial court provided the jury with the following instruction:

> "You have . . . heard evidence of an Asian male smoker series of peeping and prowling incidents. You must not consider this evidence of guilt on the charged offenses in this case."

b. *Christine N.'s testimony and the trial court's limiting instruction*

During the trial, the prosecutor asked Christine N., "Had you heard anything happening in the area that heightened your alertness or your sense of safety?" Defense counsel raised a hearsay objection. The trial court responded:

> "Overruled. Ladies and gentlemen, I'm going to allow her to answer this if she did hear something. It's not for the truth of what the something might have been, but, rather, to show why she might be

> paying attention or have a heightened sensitivity . . . .[¶] [Ms. Prosecutor,] would you please repeat the question."

Thereafter, the following colloquy occurred:

> "[Prosecutor]: Had you heard about something happening in the area that sort of heightened your alertness or alert level?"
>
> "[Christine N.]: I had. Months before, when I lived in my old apartment, there had been a notice posted on every University City resident's door alerting us to a series of rapes that had happened in the area."

2. *Governing law*

"Hearsay evidence," defined as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated," is generally inadmissible. (Evid. Code, § 1200.)

In *People v. Ortiz* (1995) 38 Cal.App.4th 377, 389, the court explained the admissibility of nonhearsay statements offered to prove a declarant's state of mind.

> "[A] statement which does not directly declare a mental state, but is merely circumstantial evidence of that state of mind, is not hearsay. It is not received for the truth of the matter stated, but rather whether the statement is true or not, the fact such statement was made is relevant to a determination of the declarant's state of mind. [Citation.] Again, such evidence must be relevant to be admissible ─ the declarant's state of mind must be in issue."

"'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.)

3. *Application*

In his brief on appeal, Baek contends that Officer Sly's and Christine N.'s testimony "was offered essentially for its truth, not to show the officer was briefed or that Christine was scared, but to inform jurors about these other sexual assaults." We disagree. As to both Officer Sly's and Christine N.'s testimony, the trial court instructed the jury that it was to consider the evidence only for nonhearsay purposes. With respect to Officer Sly's testimony regarding his knowledge of the series of peeping offenses involving a Asian male smoker, the trial court instructed the jury that it could consider Officer Sly's testimony only in evaluating why the "police officers took certain investigative steps," and that the jury was not permitted to consider the testimony regarding the peeper series as "evidence of Mr. Baek's guilt of any of the charges in this case." With respect to Christine N.'s testimony regarding why she was in a heightened state of alertness on the night in question, the trial court expressly instructed the jury that it was not to consider the testimony for its truth, but rather, only as it related to her state of mind. The jury thus was not permitted to consider the portions of Officer Sly's or Christine N.'s testimonies to which defense counsel objected, for the truth of the matters stated.[5]

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[5] We reject Baek's argument that the admission of Officer Sly's and Christine N.'s testimony violated his Sixth Amendment confrontation rights. As noted in the text, the testimony was not admitted for the truth of the matters asserted. Such nonhearsay use of evidence raises no confrontation clause concerns. (*People v. Carter* (2003) 30 Cal.4th 1166, 1209, citing *Tennessee v. Street* (1985) 471 U.S. 409, 414; *People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 16.)

We assume for purposes of this appeal that Baek also intends to contend on appeal that the trial court erred in overruling counsel's hearsay objections because the nonhearsay purposes for which the evidence was admitted were irrelevant. (See *People v. Armendariz* (1984) 37 Cal.3d 573, 585, superseded by statute as stated in *People v. Cottle* (2006) 39 Cal.4th 246, 255 ["A hearsay objection to an out-of-court statement may not be overruled simply by identifying a nonhearsay purpose for admitting the statement. The trial court must also find that the nonhearsay purpose is relevant to an issue in dispute."].) We further assume that Christine N.'s state of mind on the night of incident, and the reasons why the police took certain investigative steps, were not relevant to any issue in dispute in the case. (See *People v. Jablonski* (2006) 37 Cal.4th 774, 819 [victim's state of mind is generally irrelevant where no issue as to whether victim acted in conformity with the state of mind]; *People v. Scalzi* (1981) 126 Cal.App.3d 901 [evidence regarding why officer arrested defendant was irrelevant].)

However, even assuming that the trial court erred in admitting the evidence, the error was harmless under any standard of prejudice. The testimony was, at the very most, of marginal importance to the case; the trial court provided limiting instructions that minimized any potential prejudice, and the DNA evidence offered with respect to counts 1 through 7 was highly incriminating.

We have considered, and reject, each of Baek's contentions as to prejudice he claims to have suffered as a result of the admission of the testimony in question. First, Baek claims, "Testimony describing other sexual assaults bearing similarities to the current crimes in terms of suspects and circumstances of the offense diminished [Baek's]

defense [that he was not the assailant], essentially suggesting [Baek] as a likely perpetrator in this those and the instant crimes." To the extent that Baek is referring to Officer Sly's reference to the series of peeper offenses, the testimony was brief, the trial court instructed the jury that Baek had not been arrested for the offenses, and the court further instructed the jury that it was not to consider evidence pertaining to the uncharged peeper offenses in determining whether Baek had committed the charged offenses. To the extent that Baek is referring to Officer Sly's testimony regarding an "Asian male smoker rapist," or to Christine N.'s testimony regarding her knowledge that rapes had occurred in the area, the jury likely concluded that such testimony referred to the *charged* offenses, of which the jury was obviously aware.

Second, while Baek suggests that the jury may not have followed the court's limiting instructions, we may presume otherwise. (*People v. Avila* (2009) 46 Cal.4th 680, 719.) Third, while Baek argues that "credibility was important in the case," the jury's guilty verdicts on counts 1 through 7 were clearly not based on the victims' testimony alone. The People presented evidence that DNA taken from both Stephanie M. and Jackie P. on the nights that they were raped matched Baek's DNA.

Fourth, while Baek suggests that the jury's failure to convict him on all counts demonstrates that this case was a close one, we disagree. The fact that the jury deadlocked on the attempted burglary charge in count 8 involving Christine N. does not demonstrate that the jury had difficulty determining Baek's guilt on counts 1 through 7. Count 8 involved a different victim and a different crime. Further, whereas DNA conclusively linked Baek to the offenses charged in counts 1 through 7, whether Baek

had the requisite intent for the attempted burglary charge alleged in count 8 was less clear.

Accordingly, we conclude that the trial court did not commit reversible error in overruling defense counsel's hearsay objections to Officer Sly's and Christine N.'s testimony.

B. *The trial court did not err in precluding defense counsel from eliciting additional testimony regarding the series of uncharged peeping and prowling incidents*

Baek claims that the trial court erred in precluding defense counsel from eliciting additional testimony regarding the series of uncharged peeping and prowling incidents. Specifically, Baek claims that the court should have allowed defense counsel to elicit testimony to the effect that DNA testing had cleared Baek as a potential suspect in the series of uncharged peeping offenses to which Officer Sly referred during his testimony. Baek claims that the trial court's exclusion of this testimony violated his constitutional right to present a defense.

1. *Standards of review*

We apply the abuse of discretion standard of review to Baek's claim that the trial court erred in precluding the testimony at issue. (See *People v. Cornwell* (2005) 37 Cal.4th 50, 83-84, disapproved on another ground by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) We assume for purposes of this decision that the de novo standard of review applies in determining whether the trial court's exclusion of evidence was so extensive as to violate Baek's constitutional right to present a defense. (*People v. Seijas* (2005) 36 Cal.4th 291, 304 [stating "independent review 'comports with this court's usual

practice for review of mixed question determinations affecting constitutional rights'"], quoting *People v. Cromer* (2001) 24 Cal.4th 889, 901.)

2. *Factual and procedural background*

As discussed in detail in part III.A.1.a., *ante*, during his trial testimony, Officer Sly referred to a series of uncharged peeping offenses. The following day, outside the presence of the jury, defense counsel requested that she be allowed to present evidence that Baek's DNA did not match DNA obtained from the scenes of the uncharged peeping offenses. The trial court precluded defense counsel from asking the additional questions pursuant to Evidence Code section 352. Instead, the trial court instructed the jury not to consider evidence pertaining to the uncharged peeping offenses in determining whether Baek was guilty of the charged offenses.

3. *Governing law*

Evidence Code section 352 provides, "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

" 'The state and federal Constitutions guarantee the defendant a meaningful opportunity to present a defense. . . .' [Citation.]" (*People v. Woods* (2004) 120 Cal.App.4th 929, 936.) However, "[a]pplication of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense. [Citation.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 440.) Even erroneous limitations

placed on a defendant's right to present evidence generally do not constitute a deprivation of a defendant's constitutional right to present a defense:

> " 'Although completely excluding evidence of an accused's defense theoretically could rise to this level, excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense. [Citation.] If the trial court misstepped, "[t]he trial court's ruling was an error of law merely; there was no refusal to allow [defendant] to present a defense, but only a rejection of some evidence concerning the defense." [Citation.]' [Citations.]" (*People v. Boyette* (2002) 29 Cal.4th 381, 428.)

4. *Application*

As an initial matter, Baek overstates the significance of the evidence that defense counsel sought to elicit. Baek claims that the trial court precluded defense counsel from eliciting testimony "[t]hat DNA [t]esting *cleared* [Baek]" as a suspect in the series of uncharged peeping offenses referred to by Officer Sly. (Italics added.) Defense counsel offered to present evidence that Baek's DNA did not match DNA taken from cigarette butts obtained at the scenes of some of the peeping and prowling offenses. Defense counsel's proffer was merely that certain DNA evidence did not tend to incriminate Baek in the series of uncharged peeper/prowler offenses, *not* that the DNA evidence cleared him.

In any event, allowing additional testimony concerning the uncharged offenses would have been time consuming, and would have had minimal probative value to the issue of whether Baek committed the charged sexual assaults and attempted burglary. Further, the trial court reasonably concluded that a limiting instruction could adequately

address defense counsel's concern regarding Officer Sly's reference to the uncharged offenses.

We conclude that the trial court clearly did not abuse its discretion in excluding the additional testimony pertaining to the uncharged peeper/prowler offenses pursuant to Evidence Code section 352. We further conclude that in excluding this testimony, the court did not violate Baek's right to present a defense.

C. *The trial court did not err in excluding Baek's proffered evidence of third party culpability*

Baek claims that the trial court erred in denying his request to be allowed to present evidence that a third party might have committed the charged offenses against Stephanie M. and Jackie P. We review a trial court's ruling excluding proffered third party culpability evidence for an abuse of discretion. (*People v. Prince* (2007) 40 Cal.4th 1179, 1242.)

1. *Factual and procedural background*

During the People's case in chief, San Diego Police Detective Judith Woods testified that she supervised Detective Holt, the detective who had been assigned to investigate the sexual assault of Jackie P. Detective Woods testified that she gave Detective Holt a victim questionnaire to use in interviewing Jackie P., for the purpose of discovering possible similarities between the sexual assault of Jackie P. and other crimes. On cross-examination, Detective Woods testified that the questionnaire that she gave Detective Holt was developed "a long time ago," and that Detective Holt might have used a more updated version in interviewing Jackie P.

At a sidebar conference during Detective Woods's testimony, and at a subsequent hearing outside the presence of the jury, defense counsel indicated that she wanted to question Detective Woods regarding Jackie P.'s use of the internet, as discussed on the questionnaire, to show that "other people" may have been "stalking" her. Defense counsel also argued that she should be allowed to cross-examine Detective Woods regarding questions on the form that pertained to internet use, for the purpose of impeaching her testimony that the form she had given to Detective Holt was developed a long time ago. The prosecutor opposed the proposed cross-examination, arguing that the defense was attempting to offer irrelevant third party culpability evidence. The prosecutor also argued that the cross-examination should not be permitted for impeachment purposes because Detective Woods testified that she was not certain which questionnaire Detective Holt had used while interviewing Jackie P.

The trial court excluded the proffered cross-examination, ruling "I don't find a plausible theory of admissibility either for third party culpability or for impeachment." Subsequently, during defense counsel's cross-examination of Detective Holt, the trial court rejected an additional request by the defense to refer to victim questionnaires that police had administered to Jackie P. and Stephanie M.

After the People presented their case-in-chief, the trial court held a hearing outside the presence of the jury for the purpose of considering the admissibility of additional

third party culpability evidence that the defense wanted to present to the jury.[6] Defense counsel stated that she intended to offer exhibits[7] that contained the following evidence: (1) a composite sketch of a male suspect in a series of uncharged peeping and prowling incidents committed in the same general area as the charged offenses, and a police officer's report detailing statements made by witnesses to the uncharged offenses as to the accuracy of the sketch; (2) a series of photographs from the Department of Motor Vehicles of various Asian males described as "persons of interest" by the detectives in this case; and (3) a chart prepared by the San Diego Police Department containing descriptions of potential suspects in the peeping and prowling series, along with various witness statements used in constructing the chart.[8]

Defense counsel argued that the persons depicted in Department of Motor Vehicles photographs were Asian males, who, with one exception, smoked. According to defense counsel, one of the persons depicted had confessed to "showing his penis to

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6 Although, it is not entirely clear from Baek's brief or from the hearing concerning the third party culpability evidence, it appears that defense counsel sought to introduce evidence pertaining to persons who were considered suspects in a series of peeping and prowling incidents, under the theory that police suspected that the perpetrator of the peeping and prowling offenses was also the perpetrator of the offenses involving Jackie P. and Stephanie M.

7 Although Baek describes the proffered exhibits in his brief and provides record citations to portions of the trial court proceedings during which the contents of the exhibits were discussed, he has not transmitted the exhibits to this court. (See Cal. Rules of Court, rules 8.320(e), 8.224.) We assume for purposes of this decision that the proffered exhibits are as Baek describes them in his brief, and as described in the reporter's transcript.

8 During the hearing, defense counsel provided the following as an example of one of the suspect descriptions on the chart, "Asian male, five six to five seven . . . ."

folks." Defense counsel noted that another person had been observed as "maybe being a peeper/prowler" in the same general geographic area where the charged offenses occurred. Defense counsel argued, "Essentially, these individuals were persons of interest and, in fact, matched the suspect by height, weight, description. " Defense counsel stated that the men were all "Asian male smokers," except for one man who told police that he did not smoke. Defense counsel also noted that several of the men had provided DNA samples to police. However, defense counsel did not argue that any of the suspects' DNA samples matched samples recovered from the victims of the charged offenses, and conceded that there was no evidence that any of the third party suspects had ever entered another person's apartment without permission.

The prosecutor objected to the admission of the proffered evidence, noting that there was no direct or circumstantial evidence linking any of the purported third party suspects to the offenses committed against Jackie P. and Stephanie M.

The trial court excluded the evidence, noting, "The fact that we have other people who were committing prowling offenses in this area at this time who were Asian males, that doesn't raise a reasonable doubt in this case." The court also noted, "[J]ust because police officers viewed somebody as a person of interest doesn't necessarily mean that that's going to come into evidence at the trial. Police are trying to protect public safety and solve a crime, and they have different reasons; reasons that don't necessarily pass Evidence Code muster." In excluding the evidence, the court further observed that the defense had not provided "any direct or circumstantial evidence that would link any one

of these gentlemen to the attack on Stephanie [M.] or the attack on Jackie [P.] to the point where it would or could even raise a reasonable doubt."

2. *Governing law*

"[T]he Constitution permits judges 'to exclude evidence that is "repetitive . . . , only marginally relevant" or poses an undue risk of "harassment, prejudice, [or] confusion of the issues." ' [Citations.]" (*Holmes v. South Carolina* (2006) 547 U.S. 319, 320 [stating that evidentiary rules that preclude the admission of third party culpability evidence that does not sufficiently connect the third person to the crime are "widely accepted"].)

In *People v. Hall* (1986) 41 Cal.3d 826, 834 (*Hall*), the California Supreme Court stated, "[C]ourts should . . . treat third-party culpability evidence like any other evidence: if relevant it is admissible ([Evid. Code,] § 350) unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion ([Evid. Code,] § 352)." In describing when such third party culpability evidence is relevant, the *Hall* court held:

> "To be admissible, the third-party evidence need not show 'substantial proof of a probability' that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt. At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability . . . . [E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*Hall, supra,* 41 Cal.3d at p. 833.)

Numerous courts have applied *Hall* in considering the admissibility of evidence of third party culpability. For example, in *People v. Gutierrez* (2002) 28 Cal.4th 1083,

1134-1138 (*Gutierrez*), the Supreme Court considered whether a trial court had erred in excluding evidence that a third party involved in the trafficking of drugs might have killed the victim. In the trial court, the defendant offered to prove that the victim dealt in marijuana and other narcotics, and owed a large sum of money to a drug dealer. (*Id.* at p. 1135.) The defendant also proffered that the victim had asked him to provide armed protection for her during a drug transaction planned for the night before her murder, and that she had purchased ammunition for this purpose. (*Ibid.*) In addition, the defendant offered to prove that on the night before the murder, he and the victim met a Mexican man named Pablo for the purpose of consummating the drug deal, and that the transaction was postponed when the drugs did not arrive. (*Ibid.*) The Supreme Court concluded that the trial court did not err in excluding this evidence. "[T]here was no direct or circumstantial evidence to link Pablo or any other identifiable third party with [the victim] in the hours before her death, or indeed on the date of her death." (*Id.* at p. 1137.)

In *People v. Page* (2008) 44 Cal.4th 1 (*Page*), a defendant convicted of sexually assaulting and murdering a child, Tahisha, claimed that the trial court had erred in excluding third party culpability evidence of two other suspects, Phil P. and Brian Z. The *Page* court described the excluded evidence as follows:

> "Defendant sought to introduce evidence concerning a Phil P., 40 to 45 years of age, who resided at the Rimrock Apartments. Steve Pizzo, who lived in the Rimrock Apartments with his wife Mabel and daughter Carrie, assertedly was prepared to testify that the day after Tahisha disappeared, Mr. Pizzo told the police that two weeks earlier, Phil P. had asked Carrie, who then was 11 years of age, to accompany Phil to the desert. According to defense investigator Ron Hawkins, Carrie would testify concerning Phil's invitation and her mother's refusal to allow her to go with Phil. Carrie would

> further testify that Phil rarely was in the company of the adult residents, and instead spent his time with the children, including Tahisha, in the playground area of the apartment complex. Phil sometimes attempted to teach the children to play tennis, and when he taught a child how to swing a tennis racket, he would put his arms around the child from behind the child. Carrie provided this information to the police the day after Tahisha disappeared.
>
> "Defendant also sought to introduce evidence establishing that two days after Tahisha disappeared, Brian Z. was arrested by a patrol officer for exposing himself and masturbating near the Rimrock Apartments. Detective Franey contacted Detective Griego at approximately 3:30 p.m. on Sunday, April 25, concerning the arrest, and asked Griego to proceed to an automobile towing company and check the tire pattern on Brian's vehicle. At approximately 5:15 p.m., Franey and Griego interviewed Brian and checked the pattern on the soles of his shoes." (*Id*. at pp. 35-36.)

The *Page* court applied *Hall* and concluded that the trial court had not erred in excluding the evidence, reasoning in part:

> "The evidence concerning Phil P. and Brian Z. reflects that the police focused more attention upon defendant than upon other men whose conduct was brought to their attention, but that circumstance does not suggest anything other than that defendant, for valid and objective reasons, quickly became the prime suspect and that the police may have elected not to investigate other potential suspects more thoroughly. [Fn. omitted.] . . . . The possibility the police may have chosen not to follow up more thoroughly on all leads does not impeach the evidence against defendant." (*Page, supra*, 44 Cal. 4th at p. 37.)

3. *Application*

In this case, much of the proffered third party culpability evidence did not even relate to an "identifiable third party" (*Gutierrez, supra*, 28 Cal.4th at p. 1137), much less constitute direct or circumstantial evidence linking a third person to the actual perpetration of the crimes. Specifically, the composite sketch of a male suspect in the

peeping and prowling incidents, witness statements regarding the sketch, and the police chart containing generic descriptions of potential suspects in those crimes, clearly did not constitute admissible third party evidence. The trial court did not abuse its discretion in concluding that this evidence was too generic to constitute admissible third party culpability evidence. Similarly, as to the victim questionnaire, the fact that the questionnaire could demonstrate that, according to defense counsel, "other people" may have had the chance to make the acquaintance of the victims over the internet, did not render evidence pertaining to the questionnaire admissible.[9] (*Hall, supra,* 41 Cal .3d at p. 833 [evidence of a third party's motive or opportunity to commit a crime, without more, is not a sufficient basis upon which to admit third party culpability evidence].)

As to the persons depicted in the photographs from the Department of Motor Vehicles, the defense did not present any evidence that any of the men in the photographs had any connection to either victim, and presented no forensic evidence or eyewitness statements linking the men in any manner to either of the offenses. Contrary to defense counsel's suggestion, the fact that police investigated the men did not render the evidence admissible. (*Page, supra*, 44 Cal. 4th at p. 37.) The only evidence that the defense proffered as to these individuals' commission of the charged sexual assaults was that they smoked, fit a generic physical description of the perpetrator, and, at least with regard to

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9 Baek also argues that the trial court should have allowed the defense to present evidence of the victim questionnaire for the purpose of impeaching Detective Woods's testimony that the questionnaire was developed long ago. Detective Woods testified that she did not know which version of the form was administered to Jackie P. The trial court thus did not abuse its discretion in precluding the defense from offering evidence of the victim questionnaire for purposes of impeachment.

some of the suspects, may have committed a wholly separate peeping, prowling, or indecent exposure offense. Baek cites no authority, and we are aware of none, that would support admission of the proffered evidence as evidence of third party culpability under these circumstances.

We conclude that the trial court did not abuse its discretion in excluding Baek's third party culpability evidence because Baek failed to present any direct or circumstantial evidence linking any identifiable third party to the charged offenses.[10]

D. *The trial court did not abuse its discretion in denying Baek's motion to sever trial of the attempted residential burglary charge from trial on the other charged offenses*

Baek claims that the trial court erred in denying his motion to sever trial of the attempted residential burglary charge (§§ 459, 460, 664) (count 8) from trial of the remainder of the charged offenses (counts 1-7).

1. *Factual and procedural background*

In March 2007, the People filed an information charging Baek with two counts of sexual penetration by a foreign object (§ 289, subd. (a)) (counts 1, 4), two counts of forcible oral copulation (§ 288a, subd. (c)(2)) (counts 2, 3), and two counts of forcible

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10 Baek also claims that the trial court's alleged error in excluding the proffered evidence violated his constitutional right to present a defense. In light of our conclusion that the trial court did not abuse its discretion in determining that the proffered evidence was irrelevant, it necessarily follows that the court did not violate Baek's constitutional rights by excluding the evidence. (See *People v. Babbitt* (1988) 45 Cal.3d 660, 685 ["because defendant's evidence failed to meet the threshold requirement of relevance, its exclusion pursuant to [Evidence Code] section 352 did not implicate any due process concerns"]; accord *People v. Adams* (2004) 115 Cal.App.4th 243, 254 [rejecting claim that exclusion of "irrelevant" third party culpability evidence violated defendant's constitutional right to present a defense].)

rape (§ 261, subd. (a)(2)) (counts 5, 6). The People alleged that counts 1 through 6 occurred on or about June 13, 2005. In addition, the People alleged that on or about March 6, 2006, Baek committed an additional sexual penetration by a foreign object (§ 289, subd. (a)) (count 7). Finally, the People alleged that on or about December 4, 2006, Baek attempted to enter a building with the intent to commit rape, in violation of sections 459, 460, and 664. Although some of the counts did not identify the victims by name, it is undisputed that the offenses charged in counts 1 through 6 involved Stephanie M., count 7 involved Jackie P., and count 8 involved Christine N.

Prior to trial, Baek filed a motion to sever in which he requested three separate trials ─ one trial with respect to the offenses involving Stephanie M.[11] (counts 1-6), a second trial with respect to the offense involving Jackie P. (count 7), and a third trial with respect to the attempted burglary involving against Christine N. (count 8).[12] In a brief in support of his motion, Baek argued that evidence with respect to the attempted burglary against Christine N. would not be cross-admissible in a trial of the sexual offenses committed against Stephanie M. and Jackie P. Baek argued, "If this evidence [pertaining to the attempted burglary] is heard in conjunction with evidence of the other assaults, a jury would clearly assume that Mr. Baek was planning to assault the victim in the same

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11 On appeal, Baek challenges only the trial court's refusal to sever count 8 from the remaining counts.

12 Baek's motion to sever referred to five counts that the People alleged in a prior complaint, rather than to the eight counts alleged in the information. At the hearing on Baek's motion to sever, the trial court clarified that Baek sought to "sever . . . any counts related to each specific victim." For the sake of clarity, we refer to the counts as alleged in the information.

manner as the other two victims." Baek argued that "[t]here is no clear evidence of this," and that "[t]he sole area of cross admissibility is as indirect proof of each other." Baek also contended that the evidence as to the attempted burglary was "significantly inflammatory and prejudicial to Mr. Baek's right to a fair trial on the rape trial."

The People filed an opposition to the motion to sever counts in which they argued that the evidence as to Baek's commission of each of the offenses would be cross-admissible in separate trials as to the offenses involving each victim. The People noted that the offenses against the three victims shared numerous similarities, including that the victims were all Asian college students living in ground floor apartments located in a similar geographic area. In addition, the People argued that the perpetrator of the sexual assaults charged in counts 1 through 7 wore latex gloves during the assaults, and that latex gloves were found during a search of Baek's car after his arrest for the Christine N. incident. The People argued that "evidence of the charged crimes is cross-admissible to prove common plan and scheme, intent, and identity pursuant to Evidence Code section 1101 . . . ." The People also argued that, "If severed, each sexual assault victim and all the attendant witnesses would have to testify three times ─ in their own trial, in the sexual assault trial of the other victim, and in the attempted residential burglary trial of the third victim." The People contended that judicial economy and the dignity of the sexual assault victims would be undermined if the trial court were to grant Baek's motion.

At a hearing on Baek's motion, after hearing argument from the prosecutor and defense counsel, the court denied the motion to sever in its entirety. The court noted that there were numerous similarities among all of the charged offenses and listed many of the

facts described in the People's opposition. The trial court ruled that it was "overwhelmingly" clear that evidence as to counts 1 through 7 would be admissible in a trial on the issue of Baek's intent in committing count 8. The court also ruled that evidence of count 8 would be admissible in a trial on counts 1 through 7 on the issue of intent, specifically noting the "intent elements of the special allegations" alleged on counts 1 through 7.[13] The court also specifically ruled that Evidence Code section 352 would not bar cross-admissibility of any of the evidence.

2. *Governing law and standard of review*

a. *The law on severance*

Section 954 provides the statutory authorization for joinder of criminal charges. That section provides in relevant part:

> "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated."

Even where criminal charges are properly joined pursuant to section 954, a trial court may exercise its discretion to order separate trials in the interests of justice. "[A] determination as to whether separation [of the trial of offenses] is required in the interests of justice is assessed for abuse of discretion." (*People v. Alvarez* (1996) 14 Cal.4th 155,

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13 In the information, with respect to counts 1 through 7, the People alleged that Baek committed each offense during the commission of a burglary (§ 460, subd. (a)) with the intent to commit forcible rape (§ 261, subd. (a)(2)), within the meaning of section 667.61, subdivisions (a), (c), and (d).

188.) "In determining whether a trial court abused its discretion under section 954 in declining to sever properly joined charges, 'we consider the record before the trial court when it made its ruling.' [Citation.]" (*People v. Soper* (2009) 45 Cal.4th 759, 774 (*Soper*).)

"Denial of a severance may be an abuse of discretion where (1) evidence related to the crimes to be tried jointly would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a 'weak' case has been joined with a 'strong' case'; and (4) any one of the charges carries the death penalty. [Citations.] The first criterion is the most significant because if evidence on each of the joined charges would have been admissible in a separate trial on the other, ' "any inference of prejudice is dispelled." ' [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 985 (*Cunningham*); accord *Soper, supra*, 45 Cal.4th at p. 775, ["If we determine that evidence underlying properly joined charges would *not* be cross-admissible, we proceed to consider 'whether the benefits of joinder were sufficiently substantial to outweigh the possible "spill-over" effect of the "other-crimes" evidence on the jury in its consideration of the evidence of defendant's guilt of each set of offenses.'"].)

b. *Evidentiary law relevant to the issue of cross-admissibility*

Evidence Code section 1101 provides in relevant part:

> "(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is

> inadmissible when offered to prove his or her conduct on a specified occasion.
>
> "(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

In *People v. Ewoldt* (1994) 7 Cal.4th 380, (*Ewoldt*), superseded by statute on other grounds, as stated by *People v. Britt* (2002) 104 Cal.App.4th 500, 505, in discussing the various purposes for which evidence may be admitted pursuant to Evidence Code section 1101, subdivision (b), the Supreme Court explained that there need not be a great degree of similarity between offenses in order for evidence of commission of one offense to be admissible to prove a defendant's intent in committing another offense:

> "The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] '[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act . . . .' [Citation.] In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant ' "probably harbor[ed] the same intent in each instance." [Citations.]' [Citation.]" (*Ewoldt, supra*, 7 Cal.4th at p. 402.)

3. *Application*

Addressing the threshold issue of cross-admissibility, Baek claims that evidence as to counts 1 through 7 would not be admissible in a separate trial of count 8. We disagree. Specifically, and as the trial court expressly noted in denying Baek's motion to sever, evidence as to Baek's commission of sexual offenses against Stephanie M. and Jackie P. was highly relevant to determining whether he had the "intent to commit [a] rape," with respect to the attempted burglary charged in count 8. We reject Baek's argument that evidence of his commission of counts 1 through 7 "could not have been admissible to prove intent" with respect to count 8 because, "his intent [as to count 8] was not so clear . . . ." The fact that Baek's intent with respect to count 8 was not "clear" is a fact that would *support* admission of the evidence of his commission of counts 1 through 7. (Compare with *Ewoldt, supra*, 7 Cal.4th at p. 406 [prejudicial effect of admitting uncharged offense evidence to prove intent may outweigh probative value of such evidence in cases in which defendant's intent in committing charged offense is clear from defendant's conduct].)[14]

Beyond asserting that "the evidence on the attempted burglary count was not relevant to the other charges," Baek presents no argument on appeal that this is in fact the case. Given Baek's failure to make any affirmative showing that evidence pertaining to count 8 would not have been admissible in a trial on counts 1 through 7, he has failed to demonstrate that the trial court abused its discretion in concluding that the evidence on all

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[14] Baek does not contend on appeal that evidence on any of the counts would have been inadmissible pursuant to Evidence Code section 352.

of the counts was cross-admissible. Further, in light of Baek's failure to demonstrate a lack of cross-admissibility as to the evidence of counts 1 through 7 and count 8, we conclude that Baek has failed to demonstrate that the trial court abused its discretion in denying his motion to sever. (*Cunningham*, *supra*, 25 Cal.4th at p. 985, *Soper*, *supra*, 45 Cal.4th at p. 775.)[15]

E. *The cumulative error doctrine does not require reversal of the judgment*

Baek claims that to the extent this court concludes that no individual error related to the claims addressed in part III.A.B.C. or D., *ante*, merits reversal, the cumulative error doctrine requires reversal of the judgment.

"Under the 'cumulative error' doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial." (*In re Avena* (1996) 12 Cal.4th 694, 772, fn. 32.)

We have concluded that nearly all of Baek's claims of error are without merit. We further conclude that any assumed errors that the trial court may have committed, whether considered individually or together, do not require reversal. Accordingly, there was no cumulative error that requires reversal of the judgment.

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15 Baek also claims that the "trial court erred in failing to sever (count 8), thereby implicating [Baek's] constitutional right to a fair trial." In light of our conclusion that Baek has not demonstrated that the trial court erred in denying his motion to sever, we reject this constitutional claim as well. In addition, while Baek correctly notes, "Even if [a] ruling [on a motion to sever] was correct when made, the judgment must be reversed when the defendant shows that joinder actually resulted in gross unfairness amounting to a denial of due process," he has made no such showing in this case. In Baek's argument in his opening brief, Baek discusses only the motion to sever and does not cite to any evidence introduced at trial.

F. *There is sufficient evidence to support all of the jury's findings of guilt on the counts of forcible oral copulation and sexual penetration by a foreign object as to victim Stephanie M.*

Baek claims that there is insufficient evidence to support the jury's findings of guilt on more than one count of forcible oral copulation or more than one count of sexual penetration by a foreign object as to victim Stephanie M.

1. *Standard of review*

In determining the sufficiency of the evidence to support a conviction, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) "[T]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence ─ that is, evidence which is reasonable, credible, and of solid value ─ such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

"We resolve all conflicts in the evidence and questions of credibility in favor of the verdict, and indulge every reasonable inference the jury could draw from the evidence. [Citation.] The testimony of one witness, if believed, may be sufficient to prove any fact." (*People v. Rasmuson* (2006) 145 Cal.App.4th 1487, 1507-1508.) More specifically, " '[C]onviction of a sex crime may be sustained upon the uncorroborated testimony of the [alleged victim].' [Citation.]" (*People v. Gammage* (1992) 2 Cal.4th 693, 700.)

2. *Governing law*

Section 288a defines the crime of forcible oral copulation, and provides in relevant part:

> "(a) Oral copulation is the act of copulating the mouth of one person with the sexual organ or anus of another person.
>
> [¶] . . . [¶]
>
> (c)(2) Any person who commits an act of oral copulation when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person shall be punished by imprisonment in the state prison for three, six, or eight years."

Section 289 defines the crime of sexual penetration by a foreign object, and provides in relevant part:

> "(a)(1) Any person who commits an act of sexual penetration when the act is accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person shall be punished by imprisonment in the state prison for three, six, or eight years.
>
> [¶] . . . [¶]
>
> "(k) As used in this section:
>
> "(1) 'Sexual penetration' is the act of causing the penetration, however slight, of the genital or anal opening of any person or causing another person to so penetrate the defendant's or another person's genital or anal opening for the purpose of sexual arousal, gratification, or abuse by any foreign object, substance, instrument, or device, or by any unknown object.
>
> (2) 'Foreign object, substance, instrument, or device' shall include any part of the body, except a sexual organ."

3. *Factual background*

Stephanie M. testified that on June 13, 2005 in the early morning hours, a man, later determined to be Baek, came through her bedroom window, pushed her down, covered her mouth with a cloth, and blindfolded her. Stephanie stated that the man then perpetrated a series of sexual assaults upon her. During Stephanie's testimony, the following colloquy occurred:

> "[Prosecutor]: You have described a couple of . . . sexual acts, three or four penetrations with his penis, one penetration with his fingers and one oral copulation.
>
> "[Stephanie]: There were two.
>
> "[Prosecutor]: Two what?
>
> "[Stephanie]: There were two of each.
>
> "[Prosecutor]: Two of each what?
>
> "[Stephanie]: There was a simulation with his fingers initially before the first act of sex. And then the second act of sex. Before that there was an oral copulation. And also he stuck his fingers inside of me again.
>
> "[Prosecutor]: So two separate times he stuck his fingers in you and two separate times he put his mouth to your vagina?
>
> "[Stephanie]: Yes."

4. *Application*

Stephanie M.'s testimony, as summarized and quoted above, constitutes substantial evidence to support the jury's verdicts finding Baek guilty of two counts of forcible oral copulation and two counts of sexual penetration by a foreign object. We reject Baek's argument that the record lacks substantial evidence to support convictions for more than

one count each of forcible oral copulation and sexual penetration by a foreign object because Stephanie M. did not specifically describe each sexual act in her initial description of the assaults. Stephanie M. clearly and expressly testified that Baek committed two distinct instances of forcible oral copulation, and two distinct acts of sexual penetration by a foreign object, in response to the prosecutor's request to clarify the precise number of sexual assaults. Whether her testimony was inconsistent, and therefore lacking in credibility, was a question for the jury. (See e.g., *People v. Boyer* (2006) 38 Cal.4th 412, 480 ["[i]ssues of witness credibility are for the jury"].)

G. *There is sufficient evidence to support the jury's true finding as to the dangerous or deadly weapon special circumstance allegation on count 7*

Baek claims that there is insufficient evidence to support the jury's true finding as to the One Strike law (§ 667.61) dangerous or deadly weapon special circumstance allegation as to count 7.

1. *Standard of review*

The law regarding appellate review of claims challenging the sufficiency of the evidence with respect to One Strike law special circumstance findings is the same as that governing review of sufficiency claims, generally. (See *People v. Diaz* (2000) 78 Cal.App.4th 243, 245, 249 [applying substantial evidence standard of review to challenge to sufficiency of evidence to support One Strike law finding].) Accordingly, we apply the standard of review discussed in part III.F.1.,*ante.*

2. *Governing law*

The One Strike law (§ 667.61) sets forth an alternative and harsher sentencing scheme for certain sex crimes, including the violation of section 289, subdivision (a) alleged in count 7 (§ 667.61, subd. (c)(5).) As pertinent to this case, the One Strike law applies where the jury finds the defendant guilty of a qualifying offense and additionally finds that, "The defendant personally used a dangerous or deadly weapon or a firearm in the commission of the present offense in violation of Section 12022, 12022.3, 12022.5, or 12022.53."[16] (§ 667.61, subd. (e)(4).)

The trial court instructed the jury regarding the One Strike law dangerous or deadly weapon special circumstance allegation, as follows:

> "A deadly and dangerous weapon is any object, instrument, or weapon that is inherently deadly or dangerous, or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.
>
> "In determining whether an object is a deadly weapon, consider all the surrounding circumstances, including when and where the object was possessed, where the person who possessed the object was going, and whether the object was changed from its standard form, and any other evidence that indicates whether the object would be used for a dangerous, rather than a harmless, purpose."
>
> [¶] . . . [¶]

---

16 Sections 12022, 12022.3, 12022.5, and 12022.53 specify various weapons enhancements. For example, section 12022, subdivision (b)(1) provides: "Any person who personally uses a deadly or dangerous weapon in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for one year, unless use of a deadly or dangerous weapon is an element of that offense."

> "Somebody personally uses a deadly or dangerous weapon if he or she intentionally does any of the following: One, displays the weapon in a menacing manner, or, two, hits someone with the weapon."

3. *Factual background*

At trial, during the course of Jackie P.'s testimony, she explained that on the night of the assault, she was awakened by the feeling of a person lying on top of her. She opened her eyes and saw a man, later determined to be Baek, positioned on top of her. The man held his hand over Jackie P.'s mouth and pressed something "cold and metallic" to her face. Jackie P. was not sure of the precise nature of the object that the man was pressing against her face, but she "thought it might have been a knife." According to Jackie P., the object felt long and skinny, but not sharp. The man began to kiss her. Jackie P. tried to push the man away and began to scream. However, Jackie P. stopped struggling because the man reached for something that she believed to be the object that he had pressed against her face earlier. Jackie P. explained that she "was afraid that that object was a knife and that he would use it to hurt [her] if [she] kept struggling."

4. *Application*

Jackie P. testified that Baek surreptitiously entered her bedroom while she was sleeping, positioned himself on top of her, placed his hand over her mouth, and pressed a long, skinny, cold, and metallic object that she believed to be a knife, to her face. Under these circumstances, the jury could reasonably find that Baek personally used a dangerous or deadly weapon. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1029 ["In determining whether an object not inherently deadly or dangerous is used as such, the

trier of fact may consider the nature of the object, the manner in which it is used, and all other facts relevant to the issue"].)

We reject Baek's argument that the evidence was insufficient because Jackie "never saw a knife" and her testimony was "based on speculation that what she felt was a knife." The People were not required to demonstrate that Baek used a knife, but rather, only that he used a dangerous or deadly weapon.[17] Jackie P.'s testimony constitutes substantial evidence of the latter. We also reject Baek's argument that the lack of additional evidence in the record as to the nature of the object renders the evidence that was offered at trial insufficient to support the jury's true finding. (See *People v. Story* (2009) 45 Cal.4th 1282, 1299 ["The Court of Appeal erred in focusing on evidence that did not exist rather than on the evidence that did exist"].)

H. *The trial court did not commit reversible error in sentencing Baek to consecutive sentences on counts 1 through 6*

Baek claims that the trial court erred in sentencing him to consecutive terms on the offenses perpetrated upon Stephanie M., counts 1 through 6. Baek contends that the trial court erred in imposing mandatory consecutive terms on counts 5 and 6 pursuant to section 667.6, subdivision (d) because the trial court erroneously failed to assume that the jury's verdicts on those counts were based on acts that would give the court discretion to impose concurrent terms. In addition, Baek contends that the trial court erred in imposing discretionary consecutive sentences pursuant to section 667.6, subdivision (c)

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17 Baek does not claim that the trial court erred in instructing the jury as to the definition of a dangerous or deadly weapon.

on counts 2, 3, and 4 because the circumstances of the offenses did not warrant the imposition of consecutive sentences.[18]

1. *Factual and procedural background*

Prior to sentencing, the probation officer filed a report, Baek filed a statement in mitigation, and the People filed a statement in aggravation. The probation officer recommended that the trial court impose two consecutive terms of 25 years to life on counts 1 and 7 pursuant to the One Strike law (§ 667.61). As to counts 1 through 6 pertaining to victim Stephanie M., the probation officer noted that the record contained several potential circumstances in aggravation, including the fact that the victim was particularly vulnerable, that Baek threatened the victim, that he tied or bound the victim, and that the manner in which the crime was carried out indicated planning and sophistication. The probation officer noted that the fact that Baek had no criminal record constituted a potential circumstance in mitigation. The probation officer recommended mid-term sentences on counts 1 through 6 "in light of [*Cunningham v. California* (2007) 549 U.S. 270]."[19] The probation officer further recommended that the court impose mandatory consecutive full strength mid-term sentences of six years each, pursuant to section 667.6, subdivision (d), on counts 3, 5, and 6. The probation officer reasoned that

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18 The precise nature of Baek's sentencing claims are not clear from his brief. We interpret his claims as stated in the text.

19 In *Cunningham v. California, supra*, 549 U.S. at p. 274, the United States Supreme Court held that a former version of California's determinate sentencing law (former § 1170) violates a defendant's right to a jury trial insofar as it allowed the trial court to impose an upper term sentence based upon facts not found by a jury.

each of these attacks occurred on a separate occasion within the meaning of section 667.6, subdivision (d). As to counts 2 and 4, the probation officer stated, "While an argument could certainly be made for full strength consecutive terms [pursuant to section 667.6, subdivision (c)], the undersigned will be recommending concurrent sentences [pursuant to section 1170.1] given the significant term the defendant is already facing." The probation officer recommended a total aggregate term of 68 years to life in prison.

In his statement in mitigation, Baek claimed that the trial court should consider his lack of his criminal record, and the fact that he did not cause physical harm to either victim, as circumstances in mitigation. Baek requested that the trial court impose the shortest possible legal sentence allowed by law ─ 50 years to life in prison.

The People filed a statement in aggravation in which they noted that the trial court was required to impose a sentence of no less than 50 years to life on counts 1 and 7, pursuant to the One Strike law (§ 667.61). With respect to counts 2 through 6, the People asserted that the trial court was required to consider whether to sentence Baek pursuant to section 667.6, subdivision (d), section 667.6, subdivision (c), or section 1170.1. The People argued that the trial court should impose full strength consecutive upper term sentences on counts 2 through 6, pursuant to section 667.6, subdivisions (c) and (d), for a total aggregate term of 90 years to life in prison. In support of their argument, the People contended that the record demonstrated that the attacks in counts 3, 5, and 6 occurred on "separate occasions" within the meaning of section 667.6, subdivision (d), and that the trial court was therefore required to impose mandatory full strength consecutive sentences on these counts. The People also argued that the trial court should impose

discretionary full strength consecutive sentences pursuant to section 667.6, subdivision (c) on counts 2 and 4.[20] The People argued that each count constituted a separate act of violence for which consecutive sentencing was appropriate. With respect to their request for application of the full strength sentencing provisions of section 667.6, the People noted that the crimes demonstrated significant planning and sophistication, a threat of bodily harm, and a vulnerable victim. With respect to their request for upper term sentences, the People noted the circumstances of the offenses, as established by the One Strike law true findings.

At the sentencing hearing, the trial court heard argument from the prosecutor and defense counsel. In addition, Stephanie M. addressed the court regarding the impact the crimes had had on her life. At the conclusion of the hearing, the trial court stated that it found "the Prosecution's argument that Mr. Baek deserves the maximum sentence to be persuasive," and sentenced Baek to an aggregate term of 90 years to life in prison.

The court provided a detailed sentencing analysis. First, the court denied probation and sentenced Baek to consecutive terms of 25-years- to-life on counts 1 and 7, pursuant to the One Strike law (§ 667.61).[21] As to counts 2 through 6, the court

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20 The People also argued that the court should impose full strength discretionary consecutive sentences pursuant to section 667.6, subdivision (c) on counts 3, 5, and 6, if the court concluded that the mandatory consecutive sentencing provision of section 667.6, subdivision (d) did not apply as to any or all of those counts.

21 The trial court noted that the One Strike law had been amended after Baek's commission of the charged offenses, and stated that it was applying the earlier version of the statute in sentencing Baek. Baek raises no claim on appeal based on any distinction between the two versions of the statute.

reviewed Stephanie M.'s trial testimony and found that counts 5 and 6 occurred on separate occasions within the meaning of section 667.6, subdivision (d), and that the court was therefore required to impose mandatory full strength consecutive sentences on these counts. The court reasoned that Baek committed the acts charged in counts 1 through 6 in three segments: Baek first committed counts 1 and 2, followed by a break during which Baek left the bed and had a reasonable opportunity to reflect on his actions. Thereafter, Baek committed count 5, followed by a second break during which Baek obtained lubricant. The trial court found that this second break afforded Baek an additional opportunity to reflect on his conduct. Baek then committed counts 4 and 6.[22] The trial court stated that it would impose upper term sentences of eight years each on both counts 5 and 6, in light of the factors outlined in the People's statement in aggravation, including the planning involved in the commission of the offenses and the One Strike law true findings.

With respect to counts 2, 3, and 4, the court stated that it would impose discretionary full strength consecutive upper terms of eight years each pursuant to section 667.6, subdivision (c).[23] The court found that such sentences were warranted in light of the circumstances of the case:

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22 The trial court did not expressly state its finding as to when Baek committed count 3.

23 Although the reporter's transcript indicates that the trial court imposed the sentences on counts 2, 3, and 4 pursuant to section 667.61, subdivision (c), it is clear that the trial court intended to impose sentences on these counts pursuant to section 667.6, subdivision (c).

> "Where different sex acts are involved, each different type of act provides the perpetrator with a different form of gratification. Each different act inflicts upon the victim a different form of abuse. . . .Moreover, . . . each of these acts is a separate act of violence against this young woman. Each involve a different form of violation. With respect, for example, to counts 1 and 2, the physical acts themselves are different; each one visited upon Stephanie its own unique indignity; each was a different form of invasion of her body and her personal privacy; and caused its own form of pain. . . . Again I am mindful of the circumstances in mitigation, including this man's lack of record and his standing in the community. However, these are not enough to cause me to effectively give him a pass on the remaining counts. I thus conclude that count 2 should be a consecutive term. I conclude that the sophistication and the planning and the tying and binding allegations warrant the upper term rather than the one-third the mid-term formula or any other term."

The trial court stated that the same considerations applied to counts 3 and 4.

2. *Governing law*

a. *Applicable statutory law*

At the time of Baek's commission of the charged offenses, former section 667.6 provided in relevant part:

> "(c) In lieu of the term provided in Section 1170.1, a full, separate, and consecutive term may be imposed for each violation of . . . paragraph (2), (3), (6), or (7) of subdivision (a) of Section 261, . . . subdivision (a) of Section 289 . . . or of committing sodomy or oral copulation in violation of . . . 288a by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person whether or not the crimes were committed during a single transaction. If the term is imposed consecutively pursuant to this subdivision, it shall be served consecutively to any other term of imprisonment, and shall commence from the time the person otherwise would have been released from imprisonment. The term shall not be included in any determination pursuant to Section 1170.1. Any other term imposed subsequent to that term shall not be merged therein but shall commence at the time the person otherwise would have been released from prison.

> "(d) A full, separate, and consecutive term shall be served for each violation of . . . paragraph (2), (3), (6), or (7) of subdivision (a) of Section 261, . . . subdivision (a) of Section 289 . . . or of committing sodomy or oral copulation in violation of . . . 288a by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person if the crimes involve separate victims or involve the same victim on separate occasions.
>
> "In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions.
>
> "The term shall be served consecutively to any other term of imprisonment and shall commence from the time the person otherwise would have been released from imprisonment. The term shall not be included in any determination pursuant to Section 1170.1. Any other term imposed subsequent to that term shall not be merged therein but shall commence at the time the person otherwise would have been released from prison." [24]

b. *Case law regarding the "separate occasions" requirement of section 667.6, subdivision (d)*

In *People v. Jones* (2001) 25 Cal.4th 98, 104-105 (*Jones*), the Supreme Court summarized case law construing the "separate occasions" trigger in section 667.6, subdivision (d), which mandates the imposition of full strength consecutive sentences:

> "Under the broad standard established by . . . section 667.6, subdivision (d), the Courts of Appeal have not required a break of any specific duration or any change in physical location. Thus, the

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[24] Section 667.6 was amended after Baek's commission of the charged offenses. Baek raises no claim on appeal based on any distinction between the two statutes.

> Court of Appeal herein cited *People v. Irvin* (199[6]) 43 Cal.App.4th 1063, 1071, 51 Cal.Rptr.2d 127, for the principle that a finding of 'separate occasions' under . . . section 667.6 does not require a change in location or an obvious break in the perpetrator's behavior: '[A] forcible violent sexual assault made up of varied types of sex acts committed over time against a victim, is not necessarily one sexual encounter.' Similarly, the Court of Appeal in *People v. Plaza* (1995) 41 Cal.App.4th 377, 385, 48 Cal.Rptr.2d 710, affirmed the trial court's finding that sexual assaults occurred on 'separate occasions' although all of the acts took place in the victim's apartment, with no break in the defendant's control over the victim." (*Jones, supra,* at pp. 104-105.)

In *People v. Garza* (2003) 107 Cal.App.4th 1081, the Court of Appeal applied *Jones* and affirmed the imposition of consecutive sentencing pursuant to section 667.6, subdivision (d), under the following circumstances, "After defendant forced the victim to orally copulate him, he let go of her neck, ordered her to strip, punched her in the eye, put his gun to her head and threatened to shoot her, and stripped along with her." (*Garza, supra*, at p. 1092.) The *Garza* court reasoned, "That sequence of events afforded him ample opportunity to reflect on his actions and stop his sexual assault, but he nevertheless resumed it." (*Ibid*.)

c. *Consecutive sentences pursuant to section 667.6, subdivision (c)*

" ' "It is well settled that in making sentencing choices pursuant to section 667.6, subdivision (c), sexual assault offenses, the trial court must state a reason for imposing a consecutive sentence and a separate reason for imposing a full consecutive sentence as opposed to one-third the middle term as provided in section 1170.1." [Citation.] . . . [H]owever, the court may "repeat the same reasons." [Citation.]' [Citation.]" (*People v. Quintanilla* (2009) 170 Cal.App.4th 406, 411 (*Quintanilla*).) In determining

whether to impose consecutive sentences, the trial court is to consider the following factors:

> "(a) Criteria relating to crimes
>
> "Facts relating to the crimes, including whether or not:
>
> "(1) The crimes and their objectives were predominantly independent of each other;
>
> "(2) The crimes involved separate acts of violence or threats of violence; or
>
> "(3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior.
>
> "(b) Other criteria and limitations
>
> "Any circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences, except:
>
> "(1) A fact used to impose the upper term;
>
> "(2) A fact used to otherwise enhance the defendant's prison sentence; and
>
> "(3) A fact that is an element of the crime may not be used to impose consecutive sentences." (Cal. Rules of Court, rule 4.425.)

In determining whether to utilize the full strength consecutive sentencing provision of section 667.6, subdivision (c), "[t]he sentencing judge is to be guided by the criteria listed in rule 4.425, which incorporates rules 4.421 [(aggravating circumstances)] and 4.423 [(mitigating circumstances)], as well as any other reasonably related criteria as provided in rule 4.408 [(enumerated criteria not exclusive)]." (Cal. Rules of Court, rule 4.426(b).)

We review the trial court's imposition of full strength consecutive sentences pursuant to section 667.6, subdivision (c) for an abuse of discretion. (*Quintanilla, supra,* 170 Cal.App.4th at p. 414.)

d. *Case law regarding the manner by which the trial court is to determine the factual bases of a jury's verdicts in sentencing a defendant*

In *People v. Coelho* (2001) 89 Cal.App.4th 861, 864-865 (*Coelho*), the court noted that under the "'Three Strikes' law, the court must impose a consecutive sentence for each current offense 'not committed on the same occasion, and not arising from the same set of operative facts . . . .'" Given this sentencing provision, the *Coehlo* reasoned that for a sentencing court to be able to "determine the scope of its discretion, a court must know the factual basis of each conviction." (*Id*. at p. 865.) In a case in which "the jury could have based its verdicts upon a number of unlawful acts and the [trial] court cannot determine beyond a reasonable doubt the particular acts the jury selected," the *Coehlo* court held that "the [trial] court should assume that the verdicts were based on those acts that would give it the most discretion to impose concurrent terms." (*Ibid*.)

e. *Applicable harmless error principles*

In *Coelho, supra,* 89 Cal.App.4th at page 889, the court noted that a trial court's error in imposing a defendant's sentence does not require remand where it is clear that the trial court would impose the same sentence on remand:

> "Where sentencing error involves the failure to state reasons for making a particular sentencing choice, including the imposition of consecutive terms, reviewing courts have consistently declined to remand cases where doing so would be an idle act that exalts form over substance because it is not reasonably probable the court would

> impose a different sentence. [Citations.] Although this case involves a misunderstanding concerning the scope of the discretion [citation], we nevertheless consider a remand here to be an idle and unnecessary, if not pointless, judicial exercise."

3. *Application*

a. *The trial court did not commit reversible error in imposing mandatory consecutive terms on counts 5 and 6 pursuant to section 667.6, subdivision (d)*

Baek argues that because Stephanie M. testified to four acts of rape, and because the jury's verdicts on counts 5 and 6 did not reflect on which acts of rape the jury based its guilty verdicts, the trial court was bound, under *Coelho, supra,* 89 Cal.App.4th at pp. 864-865, to assume that the verdicts were based on those acts that would give it the most discretion to impose concurrent terms.[25] According to Baek, "had the trial court chosen the two acts of vaginal penetration occurring sequentially just after appellant obtained the lubricant, this would have supported concurrent sentences."

We assume for the purposes of this appeal that Baek is correct that the trial court was required to assume that the jury based its verdicts on counts 5 and 6 on the two acts of vaginal penetration that occurred after Baek obtained lubrication. However, even if this is so, we conclude, under any applicable standard of prejudice, that the trial court would have found that these two rapes occurred "on separate occasions" for purposes of

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25 Baek also states in this portion of his brief that, "Stephanie's testimony to the jury described only one act of oral copulation and one of digital penetration." In part III.F., *ante*, we concluded that there is substantial evidence in the record to support all of the jury's findings of guilt on the counts of forcible oral copulation and sexual penetration by a foreign object as to victim Stephanie M. Accordingly, we reject Baek's sentencing claim to the extent that it is premised on the contention that Stephanie described only a single act of oral copulation and a single act of digital penetration.

section 667.6, subdivision (d), because Baek "had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior." We reach this conclusion in light of the following portion of Stephanie M.'s testimony regarding the events occurring between the rapes that Baek committed after obtaining the lubricant:

> "[Prosecutor]: That last time or that third time he tried ─ he got into your vagina, what happened after that?
>
> "[Stephanie M.]: After he attempted to have a full erection, it didn't happen. So he sat by my bed. And he said, 'Please don't call the cops.' He made me promise him not to tell the cops ─ call the cops on him. And he said he wouldn't come back if I didn't call the cops. And he wouldn't hurt me if I wouldn't call the cops. And I promised him I wouldn't call the cops.
>
> "[Prosecutor]: Did he leave?
>
> "[Stephanie M.]: And then I said, 'It's not working. Can you please leave. And I won't call the cops. Can you please leave.' And he made another attempt at sexual intercourse." !(RT 212-213)!

In light of the trial court's finding, in determining that counts 5 and 6 occurred on separate occasions, that Baek's act in obtaining the lubricant afforded him a reasonable opportunity to reflect upon his actions (see pt. III.H.1., *ante*), it is inconceivable that the trial court would have concluded that Baek's conversation with Stephanie M. in which he pleaded with her to refrain from calling the police did *not* afford him a reasonable opportunity to reflect upon his actions (see pt. III.H.1., *ante*). (Cf. *Coelho, supra*, 89 Cal.App.4th 861, 889 [concluding remand for resentencing not required where it was "inconceivable" that the trial court would impose a concurrent term in light of the trial court's other sentencing decisions].) In other words, given that Baek had a conversation

with Stephanie M. in which he expressly reflected upon his criminal behavior by pleading with her not to call the police, and nevertheless resumed his assaultive conduct after that conversation, we are certain that the trial court would have found that Baek "had a reasonable opportunity to reflect upon his or her actions and nevertheless resumed sexually assaultive behavior" (§ 667.6, subd. (d)), if the court had assumed that the jury based its verdicts on counts 5 and 6 on the two acts of vaginal penetration that occurred after Baek obtained lubrication.

In sum, it is clear that the trial court would have properly found that counts 5 and 6 occurred on separate occasions within the meaning of section 667.6, subdivision (d), if the court had assumed that the jury based its verdicts on counts 5 and 6 on the two acts of vaginal penetration that occurred after Baek obtained lubrication. (See *People v. Garza*, *supra*, 107 Cal.App.4th at p. 1092.) Under these circumstances, a remand for resentencing is not required. (*Coelho*, *supra*, 89 Cal.App.4th at p. 889.)

b. *The trial court did not abuse its discretion in imposing discretionary consecutive terms on counts 2, 3, and 4, pursuant to section 667.6, subdivision (c)*

The record reflects that the trial court properly considered whether to utilize the full strength consecutive sentences provision of section 667.6, subdivision (c). (See *Quintanilla*, *supra*, 170 Cal.App.4th at p. 414.)[26] As noted above, the trial court mentioned the following circumstances as supporting the imposition of full strength

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26 Baek also forfeited any argument that the trial court failed to state sufficient reasons for sentencing under section 667.6, subdivision (c) because he raised no objection in the trial court. (See *People v. Scott* (1994) 9 Cal.4th 331, 353.)

upper term consecutive sentences with respect to counts 2 through 4: each type of sex act provided Baek with a different form of gratification, each of the different acts subjected Stephanie M. to a different form of abuse, each act constituted a separate act of violence, Baek's commission of the acts reflected sophistication, and the circumstances of the offenses were aggravated in light of the tying or binding special circumstance. We conclude that the trial court did not abuse its discretion in determining that these circumstances supported the imposition of consecutive sentences pursuant to section 667.6, subdivision (c). (See *Coelho, supra,* 89 Cal.App.4th at p. 888 [trial court provided adequate statement of reasons for imposing consecutive sentences where trial "court could reasonably find that the objectives behind the touching and digital penetration were separate and distinct: to achieve different forms of sexual gratification, first by being passive and having the victim manipulate his genitals; and then by being active and penetrating her genitals," and noting that " a defendant who decides to commit different types of sexual acts ─ e.g., digital penetration, oral copulation, and sodomy ─ may reasonably be deemed more culpable than a person who repeats one of those acts three times, perhaps in rapid succession without much thought"].)[27]

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27 Although the trial court sentenced Baek to consecutive sentences for the same type of sexual misconduct on counts 5 and 6 (rape), it did so because it found that the rapes were committed on separate occasions within the meaning of section 667, subdivision (d).

IV.

DISPOSITION

The judgment is affirmed.

AARON, J.

WE CONCUR:

McINTYRE, Acting P. J.

IRION, J.